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IN THE
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF WALTER C. BARBER AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Walter C. Barber, was the Director of the Office of Air Quality Planning and Standards ("OAQPS") at the Environmental Protection Agency ("EPA") from 1976 to early 1982.[2] In that capacity, he was in charge of staff involved in the development of the Clean Air Act regulations at issue in the present case, *i.e.*, the regulations governing pre-construction review and permitting of new and modified sources of air pollution, 45 Fed. Reg. 52,676 (August 7, 1980), commonly referred to as the 1980 "New Source Review" ("NSR") regulations.[3] While serving as Director of OAQPS, Mr. Barber also served as EPA's Acting Administrator from January to May 1981. During the time Mr. Barber was Director of OAQPS, Mr. Edward E. Reich, as Director of EPA's Division of Stationary Source Enforcement ("DSSE"), issued two applicability determinations regarding the NSR regulations that are at the heart of this case.[4] Due to his first-hand

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[1] All parties have consented to the filing of *amicus* briefs in letters that are on file with the Clerk. *Amicus*, Walter C. Barber, is receiving no payment of any kind in connection with this brief. Mr. Barber, however, served as a paid expert witness for Respondent Duke Energy Corporation in the trial court proceedings below with respect to issues other than those addressed in this brief. This brief was not authored in whole or in part by any attorney who is serving or has served in this case as counsel for a party.

[2] Mr. Barber has worked in the private sector since he left EPA. Since 2000, he has been a Group Vice President for Jacobs Engineering Group, Inc., with responsibility for its businesses in Asia and the Middle East.

[3] The term "New Source Review" is intended here to refer both to EPA's regulations for the Prevention of Significant Deterioration ("PSD") in so-called "clean air" areas and to the regulations governing pre-construction review in "nonattainment" areas.

[4] *See* Letter from Edward Reich, Director, Division of Stationary Source Enforcement, EPA, to Amasjit Gill, General Electric (June 24, 1981) (Jt. Appx. at 27-34); Memorandum from Edward Reich, Director,

knowledge of Mr. Reich's position within the Agency at that time, Mr. Barber is able to clarify the role that Mr. Reich and his office played in the development and implementation of the 1980 NSR regulations. Mr. Barber, in the interest of justice, respectfully wishes to assist the Court in gauging the significance of Mr. Reich's two determinations in 1981.

SUMMARY OF THE ARGUMENT

The various interpretations of the 1980 NSR regulations that Mr. Reich issued during 1981 in his capacity as Director of DSSE were authoritative. First, during the 1979-80 rulemaking and then during 1981, Mr. Reich was the top civil servant at EPA in charge of setting national policy for stationary source enforcement under the Clean Air Act. Second, Mr. Reich's office, DSSE, was the office within EPA that had primary responsibility and authority both for making applicability determinations under those regulations and for overseeing EPA's regional offices in following such determinations and referring requests for determinations. Finally, DSSE staff participated on the internal EPA working group that drafted the proposed and final versions of the 1980 NSR regulations.

ARGUMENT

In its Brief in Support of Petitioners, the United States characterized Mr. Reich as "a mid-level EPA official"[5] and his interpretations as "not authoritative."[6] Indeed, in its petition to the U.S. Court of Appeals for the

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Division of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief, Technical Analysis Section, Region VII, EPA (Jan. 22, 1981) ("Cargill Memo") (Jt. Appx. at 35-37).

[5] Brief for the United States as Respondent Supporting Petitioners (July 21, 2006) at 13, 28.

[6] *Id.* at 14.

Fourth Circuit for rehearing in this case, the United States went so far as to describe Mr. Reich as "an inferior EPA official" during the relevant timeframe.[7] In a similar vein, some of the *amici curiae* supporting Petitioners in this case described Mr. Reich in their briefs as merely "a single EPA staff member"[8] and "a single agency employee."[9]

These characterizations by the United States and certain *amici* are factually incorrect and misleading, for the following reasons.

A. Mr. Reich Was Not an "Inferior" Official, But Instead at the Apex of EPA's Organizational Structure and in Charge of Clean Air Act Enforcement for the Nation's Entire Industrial Stock

First, it is critical to understand the organizational structure of EPA as it existed during the relevant period, 1979-81. Then, as now, the foremost authority to direct EPA's operations resided in the President and his appointees, especially the EPA Administrator, Deputy Administrator, and various Assistant Administrators. In 1979-81, the total number of such appointees was relatively small – fewer than 20. The next layer of management under those presidential appointees consisted of the top ranks of the career civil service, generally members of the Senior Executive Service ("SES"). Members of the SES also constituted a relatively small percentage of EPA's workforce. Beneath them were

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[7] United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005), at 13 n.6, excerpt attached as Appendix A.

[8] Brief of Former EPA Administrators Carol M. Browner and Russell E. Train as *Amici Curiae* in Support of Petitioners (July 21, 2006), at 19.

[9] Brief of the States of New York *et al.* as Amici Curiae in Support of the Petitioners (July 21, 2006), at 18.

multiple layers of middle managers, career civil servants, and other staff. During 1979-81, the total number of EPA employees nationwide was approximately 8,000-9,000. Thus, just below the thin layer of presidential appointees was a large number of civil servants supervised by a small cadre of SES-level professional managers.

Mr. Barber was the Director of OAQPS, with the responsibility for developing regulations to govern air pollution from stationary sources. He reported to the Assistant Administrator for the Office of Air & Radiation ("OAR"), a presidential appointee, who in turn reported directly to the EPA Administrator. Thus, Mr. Barber was only the second layer down from the Administrator in terms of setting national policy for stationary sources.

During the key period, 1979-81, Mr. Reich held a position that was comparable to Mr. Barber's, but it was in the parallel chain of command devoted to enforcement. That chain of command was known as the Office of Enforcement ("OE"). It had its own Assistant Administrator, who also reported directly to the Administrator. Thus, like Mr. Barber, Mr. Reich was only the second level down from the Administrator of EPA. Within OE, Mr. Reich was the Director for stationary source enforcement, responsible for communicating national policy on implementation and enforcement of the NSR program, and for ruling on NSR applicability determinations. Thus, Mr. Barber and Mr. Reich were peers who complemented each other functionally. Mr. Barber was responsible for leading the development of rules for air pollution from stationary sources, and Mr. Reich was responsible for leading the enforcement of those rules. Moreover, Messrs. Barber and Reich were the persons slated to provide continuity for the regulation of stationary sources as presidential administrations came and went.

From the standpoints of the Nation's environment and economy, the positions of Messrs. Barber and Reich were of critical importance and high prominence within the field of air quality management. The term "stationary sources" encompasses electric utilities, all manner of manufacturing plants, and the rest of the Nation's industrial capacity. The policies governing air pollution from such capital stock have profound implications for the health of citizens and the economy. Messrs. Barber and Reich were the top civil servants in charge of implementing those policies and, hence, uniquely positioned to have a significant impact on air quality and the economy.

In sum, Mr. Reich, along with Mr. Barber, were at the apex of the large body of civil servants at EPA who were responsible for controlling emissions from stationary sources. Below the thin layer of presidential appointees, no one in the field of stationary source enforcement had a position of greater authority, importance, and prominence than Mr. Reich. To say, as the United States does now, that he was merely a "mid-level" or "inferior" official, and that his interpretations were not authoritative, is simply wrong. Likewise, Mr. Reich was not just "a single agency employee," as certain *amici* would have it, but rather among the most senior of all the career employees in the chain of command devoted to stationary sources under the Clean Air Act.

B. During 1981 and Many Other Years, Mr. Reich's Office, DSSE, Had Lead Responsibility and Authority for the Making of Applicability Determinations for the 1980 NSR Regulations, and Was Active in Carrying Out That Responsibility

Implementation of the Clean Air Act for stationary sources has involved not only a hierarchy of officials at EPA's headquarters, but also officials in various sub-offices in each of EPA's ten regional offices (*e.g.*, offices that process "State Implementation Plans" or engage in enforcement activities) and in air pollution programs at the state, tribal, and territorial levels. Given the extensive variety of federal and non-federal offices involved, the vast number of stationary sources under regulation, and the diversity of source-specific circumstances, EPA from its inception has tried to ensure even-handed and consistent treatment of such sources, including such treatment under the NSR regulations.[10] One way EPA tried to do this during 1981 and surrounding years was to designate a single EPA Headquarters office as having the lead in issuing applicability determinations on behalf of Headquarters. For the 1980 NSR regulations, and for the relevant period (1979-81), that office was DSSE.

Typically, a stationary source or a state official would present an NSR applicability question to an EPA regional office. If the regional office could not answer the question confidently on the basis of the regulatory language or prior

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[10] Congress directed EPA to provide national uniformity and fairness in the criteria and policies applied by the various EPA regions in implementing and enforcing the Clean Air Act. See § 301(a)(2)(A) of the Act, 42 U.S.C. § 7601(a)(2)(A) (2006), and EPA's implementing "regional consistency" regulations at 40 C.F.R. §§ 56.1-56.7 (2006), *promulgated at* 45 Fed. Reg. 85,400 (Dec. 24, 1980).

determinations, then the regional office would refer the question to Mr. Reich's office. DSSE was understood within EPA and by state air pollution control officials to be the lead office for resolving applicability questions under the 1980 NSR regulations.[11] DSSE's determinations were binding on the regional offices and the states, subject only to reconsideration or appeal to the relevant presidential appointees.

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[11] The definitiveness of Mr. Reich's NSR guidance and interpretations around the 1981 time period is corroborated by contemporaneous documents and deposition testimony from two EPA career employees intimately involved in the NSR programs from their inception. In late 1983, for instance, Mr. Reich's office sent the appropriate directors in each of EPA's regional offices "a summary of all PSD determinations of applicability made by [his office] between May 1, 1983 and September 30, 1983," with instructions to "take note of the determinations and assure that affected agencies in your Region are aware of them as well." Mr. Reich commented that the summary would be his office's last, as the Comptroller's Office had "eliminated [his office's] applicability determination function." Memorandum from Edward Reich, Director, Stationary Source Compliance Division, EPA, to Directors, Air & Waste Management Divisions, EPA Regional Offices (1983), excerpt attached as Appendix B.

Michael Trutna, the chief of EPA's NSR section in the early 1980s, affirmed in deposition that, in mid-1983, Mr. Reich was "the ranking official that made [PSD] applicability determinations." Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182, at 290 and 292 (S.D. Ohio Jan. 29, 2002), excerpts attached as Appendix C. Ronald Van Mersbergen, the regional NSR specialist for EPA Region V, also affirmed that Mr. Reich's office was the EPA office responsible for making applicability determinations in the early years of NSR. *See* Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182, at 203-06 (S.D. Ohio Oct. 7, 2002), excerpts attached as Appendix D. Mr. Van Mersbergen further affirmed that compilations of DSSE's applicability determinations would have been sent to, and binding upon, states with delegated authority to administer the PSD program on behalf of EPA. *See id.* at 207-12.

Under the organizational structure at the time, the enforcement function was separated from the air program rulemaking development function. The air program rulemaking responsibility was assigned to OAQPS, and the enforcement responsibility was assigned to DSSE. Responsibility for NSR applicability determinations was assigned to Mr. Reich's office. Mr. Reich and his DSSE staff could consult, and did consult, with OAQPS, the Office of General Counsel, and other relevant offices as they deemed necessary in making applicability determinations.[12]

DSSE performed the job of making applicability determinations for the 1980 NSR regulations frequently. Its staff, under Mr. Reich's direction, was in the business of making NSR determinations, both under the 1980 regulations, but also under the predecessor regulations.[13]

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[12] DSSE's 1981 applicability determination for Cargill, Inc. (*see* Jt. Appx. at 35-37), for example, states, "This determination has been made with the concurrence of the Office of Air Quality Planning and Standards and the Office of General Counsel."

[13] DSSE emphasized its role with respect to those predecessor regulations in a February 13, 1978 memorandum to EPA Region I, as follows:

> Further, it is the function of DSSE to provide guidance for interpretations which address the implementation of these regulations [*i.e.*, the NSR regulations for the Prevention of Significant Deterioration ("PSD") in effect at the time]. Reliance upon opinions obtained from other EPA offices without consulting DSSE will not ensure uniform national policy for implementation of these regulations. Agency policy requires that DSSE, after consulting with other EPA offices, make the final recommendation for interpretation of these requirements.

See Memorandum from Edward Reich, Director, Division of Stationary Source Enforcement, EPA, to Thomas W. Devine, Chief, Air Branch – Region I, EPA (Feb. 13, 1978) (Jt. Appx. at 477-483).

Winston Smith, who was chief of the Air Programs Branch of EPA's Region 4 office in Atlanta, Georgia in the late 1970s and early 1980s

During the six-year period from 1978 to 1983, DSSE made at least 94 NSR applicability determinations.[14] Plainly, DSSE had a substantial amount of experience handling NSR applicability determinations during the relevant period.

In sum, Mr. Reich was not just one air pollution manager at EPA among many managers all having some responsibility for implementing the 1980 NSR regulations. To the contrary, he was the manager who had the lead responsibility for making applicability determinations that were to govern the behavior of EPA regional offices and states in their implementation of those regulations. Moreover, he and his staff typically carried out that responsibility through consultation and the building of consensus as necessary, and they had a substantial amount of experience in issuing such applicability determinations. Against this background, it is incorrect to say that Mr. Reich's NSR determinations were not authoritative.

C. Mr. Reich's Office, DSSE, Participated Actively in the Rulemaking That Produced the 1980 NSR Regulations, Including the Drafting and Internal Review of the Proposed and Final Versions of Those Regulations

During Mr. Barber's tenure at EPA, the Agency used a working-group system for developing rules. For example,

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and is currently director of the waste management division there, affirmed in deposition that DSSE regularly sent guidance on PSD to all of the EPA regional offices, so as to share information with them and ensure the uniform interpretation and application of the rules. Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF, at 7-9 and 23-25 (E.D. Ky. Sept. 7, 2005), excerpts attached as Appendix E.

[14] These statistics are the result of searches in EPA's central web-based collection of NSR determinations, located at http://www.epa.gov/region7/programs/artd/air/policy/search.htm.

if EPA undertook a rulemaking, it would first form a working group made up of representatives of each office that had an institutional interest in the outcome. The group would prepare the necessary *Federal Register* notices and supporting analyses, and then push the notices up through the appropriate chains of command, and eventually to the Administrator, for signature. During the review and signature phase, each office director, such as Mr. Reich, would be asked to concur, concur with comments, or non-concur in the package of notices and analyses.

This system was used to develop the 1980 NSR regulations. The working group would have included representatives from OAQPS, DSSE, the Office of General Counsel, and certain other offices. During the rulemaking process from 1979-80, the group held frequent meetings to discuss specific issues. The representatives of particular offices were expected to contribute from the standpoint of the particular interests of their office. For instance, the DSSE representatives would have been expected to help and comment primarily with respect to enforcement policy. Moreover, the proposed and final rules would not have reached the Administrator's desk unless Mr. Reich had reviewed and commented on the *Federal Register* packages containing them.

Having participated in the rulemaking for the 1980 NSR regulations, the DSSE representatives on the working group would have gained an expert level of knowledge about the format and enforceability of the regulations, putting them in a good position to formulate authoritative interpretations of the regulations. Both the United States and the *amici* in question overlook this important reality when they suggest that Mr. Reich's office was just one ordinary office among several having some NSR responsibility.

CONCLUSION

Mr. Barber respectfully submits, based on his personal knowledge as Mr. Reich's peer during the formation of the 1980 NSR regulations, that Mr. Reich's applicability determinations and underlying interpretations of the 1980 NSR regulations were in fact authoritative, contrary to the suggestions of the United States and certain *amici*. Mr. Reich in 1981 was the top civil servant for stationary source enforcement under the Clean Air Act. The Agency had given him, as DSSE Director, the lead responsibility for making applicability determinations that were to govern implementation of the 1980 NSR regulations by EPA's regional offices and state, tribal and territorial agencies across the Nation. DSSE as an office and its director, Mr. Reich, had extensive experience making NSR applicability determinations. Finally, DSSE participated in the development of the 1980 NSR regulations.

Respectfully Submitted,

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